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Docket No. 81-2332

In the Supreme Court of the United States

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE CITY OF NORFOLK, VIRGINIA, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress, in passing the Uniform Relocation Act of 1970 [URA], intended to include utilities as "displaced persons" entitled to relocation for removing their facilities from public rights-of-way, thereby completely abrogating the universal common law rule that utilities bear the expense of relocating their facilities from public streets and placing a heavy financial burden on already beleaguered cities, despite the total lack of any indication of congressional intent to drastically change existing law?

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BRIEF OF THE CITY OF NORFOLK, VIRGINIA, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the City of Norfolk, Virginia, by its duly authorized legal officer pursuant to Rule 36.4 of this Court.

Petitioner, the Norfolk Redevelopment and Housing Authority [NRHA], has undertaken numerous federal- and city-financed urban renewal projects in Norfolk. The decision below that NRHA must pay Respondent Chesapeake and Potomac Telephone Company [C & P] for relocation costs that may reach a million dollars with interest for removing its facilities from streets affects the city directly. Although NRHA is a political subdivision of the Commonwealth of Virginia, independent of the city, any liability NRHA incurs ultimately will be borne by the city. Even if NRHA paid the judgment itself, it would do so from money otherwise available for redevelopment projects in Norfolk

Norfolk has been a showcase for urban renewal projects. From a decaying Southern port city, unable to adjust to

the burgeoning presence of the Navy following World War II, it has been rebuilt into a model for what federal funds, a committed citizenry, and local business initiative can achieve. Payment of this judgment, as well as of potential retroactive claims for all utility dislocations since 1970, could do much to stymie the remarkable progress of Norfolk, as well as that of numerous other cities reborn with federal funds. Those federal funds, already sharply curtailed by recent budget cuts, will be further depleted by any unexpected obligation to repay the enormous costs of moving utility facilities from streets. Such a reduction in development funds could deal a devastating economic blow to Norfolk, as to other core cities trying to rebuild deteriorating areas with increasingly scarce federal funds, in order to build up their tax bases by attracting

industries and businesses.

Although the City of Norfolk is not aware of any similar claim being filed by a utility company prior to the one filed by C & P, numerous claims have been filed or are expected to be filed since the Fourth Circuit's decision in the instant case. See the results of the questionnaire to its members, appendix, brief of amicus curiae, the National Institute of Municipal Law Officers [NIMLO].

STATEMENT OF THE CASE

Appellant C & P sued NRHA and the Secretary of HUD in the United States District Court for the Eastern District of Virginia for the costs of relocating their facilities from Norfolk city streets pursuant to a redevelopment plan financed with federal funds. C & P claimed that under the Uniform Relocation Assistance and Real Property Acquisitions Policies

Act [URA], 42 U.S.C. §§ 4061 et seq., and the corresponding Virginia act, Va. Code Ann. §§ 25-235 et seq., it was a "displaced person" and, as such, entitled to reimbursement for the cost of moving its underground telephone lines and equipment at the city's request. The city had ordered C & P to move its facilities from streets that the city planned to close or improve in connection with NRHA's redevelopment plans. The franchise agreement between the City of Norfolk and C & P's predecessor corporation provides that C & P will pay for moving its facilities at its own cost whenever the city so requests.

C & P's claim was made first to NRHA, which reviewed and denied it. After NRHA's denial was upheld by HUD's area office, C & P filed suit in the United States District Court for the Eastern District of Virginia. That court found

that Congress did not intend to include utility companies as "displaced persons" under the URA for the purpose of reimbursing them for the costs of moving their facilities from public streets. The District Court, therefore, denied all C & P's claims. Chesapeake & Potomac Telephone Co. v. Landrieu, et al., No. 79-906-N (U.S.D.C., E.D. Va., June 4, 1981)(Appendix A). C & P appealed to the Fourth Circuit, which reversed the lower court on March 25, 1982, declaring C & P to be a "displaced person" entitled to relocation benefits under the URA. Chesapeake & Potomac Telephone Co. v. Landrieu, et al., No. 81-1602 (U.S. Cir. Ct., 4th Cir., March 25, 1982)(Appendix B).

SUMMARY OF ARGUMENT

This Court should reverse the appellate court's interpretation of the URA as providing for reimbursement to utility

companies for removing their facilities from public streets for several reasons. First, it is based on a completely erroneous statutory interpretation of the Act as totally abrogating the common law, despite the lack of any indication of congressional intent to do so, which is contrary to basic principles of statutory interpretation. Second, the Fourth Circuit's decision is contrary to decisions by every other state and federal court that has considered the issue. Third, the decision interprets the URA as acting unconstitutionally in impairment of the contract, or franchise agreement, between the City of Norfolk and C & P by eliminating the city's contractual right to order C & P to remove its facilities from Norfolk's streets, at its own expense, an obligation C & P assumed in return for its rights to install those facilities without payment to the city.

Last, the decision could have a devastating, nationwide economic impact on cities by requiring them to pay millions in claims of utilities, unbudgeted and unplanned for, shifting funds away from the urgent needs of repairing decaying infrastructure and redeveloping blighted areas tc attract businesses and rebuild their tax bases.

ARGUMENT

I. UNDER THE CLASSIC RULE OF STATUTORY CONSTRUCTION, CONGRESS DID NOT INTEND THE URA TO ACT IN COMPLETE DEROGATION OF THE COMMON LAW BECAUSE THERE IS NO INDICATION OF SUCH INTENT.

The reach of the URA is very broad. It governs reimbursement to those displaced by almost all federally run or funded projects except for highways. This Court has examined it only a few times, most recently in Alexander v. HUD, 441 U.S. 39 (1979). That case makes

clear, however, that the Act is not intended to reimburse everyone displaced in any manner by a federally assisted program. It was intended to codify existing laws governing reimbursements for federally displaced persons and businesses, but not to create new rights of action.[1]

The Fourth Circuit, nevertheless, construed the URA as creating a new cause of action in utility companies that would reimburse them for removing facilities from public streets. This construction, however, would require the Court to conclude that Congress in passing the URA intended to totally abrogate the common law that denies such reimbursement to

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[1] At least one court has held that the URA did not create a private right of action by property owners against municipalities to collect relocation benefits provided for in the Act and, therefore, the aggrieved party can not sue the municipality to collect these benefits. Whitner & Ferris v. City of Buffalo, 455 N.Y.S.2d 454 (N.Y. App. 1982).

utility companies. There is no indication in the legislative history of the URA that Congress so intended and much to indicate the contrary.

The well-accepted rule of statutory construction is that a legislative body should not be assumed to have acted to overturn completely the existing common law without a clear indication by the legislature that it intended to so act. Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959). The history of the URA is devoid of any such indication. This rule should be applied most strictly where one party seeks to infer a congressional intent "to impose massive financial obligations on the states" upon which is contingent the receipt of federal funds by the states. Such an obligation should be so clearly stated that there remains no doubt that the state or local government understood the

financial responsibilities attendant on the acceptance of federal funds. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 16-17 (1981).

The common law in Virginia, as in almost all the states, is that utility companies are not reimbursed for removing their facilities from public streets at the request of the municipality because the utilities enjoy no property rights in the public rights-of-way.[2] The understanding is that the city grants utility companies the right to place their facilities in public streets without any charge, on the condition that those facilities will be relocated at the expense of the utilities when the city so requests. This common law rule governing

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[2] Chesapeake & Potomac, No. 79-906-N, supra, & cases cited therein; 12 McQuillin, Municipal Corporations § 34.74a (3d ed. 1970).

placement and removal of utility lines and equipment for streets is so universally acknowledged that it can only be abrogated by clear statutory language to the contrary. Connecticut Railway & Lighting Co. v. New Britain Development Comm'n, 161 Conn. 234, 287 A.2d 362 (1971). This rule was stated clearly by the California Court of Appeals in discussing the import of the URA on existing common law:

> . . .[I]n the absence of a provision to the contrary, it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets.

Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 151 Cal. Rptr. 68, 69, 87 Cal. App. 3d 296 (1978). Accord, Chesapeake & Potomac, No. 79-906-N, supra.

Given the almost universal common law denying reimbursement to utilities for removing their facilities and applying the classic rule of construction that a statute will not be interpreted to act in complete derogation of the common law absent a clear expression of legislative intent to so act, the URA should only be read to change the common law on the subject if Congress expressed a clear intent to so act. The Fourth Circuit, however, ignored that rule of construction to give a literal reading to the Act's broad definition of "displaced persons" to include reimbursement to utilities for removing facilities because it found no indication one way or the other as to whether Congress intended to include them. Chesapeake & Potomac, No. 81-1602, supra. The rule of statutory construction, however, mandates the opposite approach: If there is no indication

one way or the other of legislative intentions, the assumption should be that a legislature would not seek to abrogate a long-standing common law rule without clearly indicating such purpose.

In contrast to this misreading by the Fourth Circuit, the District Court correctly construed the statute when it wrote:

> In the adoption of the Uniform Relocation Act of 1970, if Congress chose to abrogate such a well known common law principle, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act or in its legislative notes and history.

Chesapeake & Potomac, No. 79-906-N, supra.

The error of the Fourth Circuit's reading is highlighted by one stated basis for its decision. The appellate court pointed out that the URA was in complete derogation of the common law as to

tenants-at-will by providing relocation payments for such tenants. Therefore, reasoned the court, the URA must similarly abrogate the common law as to utilities. Chesapeake & Potomac, No. 81-1602, supra. That logic ignores the vital distinction that the Act itself expressly provides for payments to tenants-at-will, 42 U.S.C. § 4624, while failing to mention utilities at all. In fact, the inclusion of tenants-at-will in the URA reinforces the city's point: That when Congress chooses to reverse a common law of long standing, such as it did in the case of tenants-at-will, it does so by expressly including them as it did by specifically providing for payments to tenants-at-will in the URA.

In contrast, the Act itself and its legislative history contain no reference to utilities. That fact alone should

leave the common law intact, but the context of the legislative history clarifies congressional intent to exclude utilities from URA benefits. The URA was an attempt to redraw the complex puzzle of diverse statutes and rules governing reimbusement to those displaced by federally aided programs and replace them with a uniform system of payments. Alexander v. HUD, supra. It was not intended to create new causes of action such as a major new right to reimbursement on the part of utilities.

Another contrast to Congress' failure to specify payment for utility relocations in the URA is offered by congressional inclusion of a specific provision in the Federal Aid to Highways Act of 1958 that provided for reimbursements to utilities for displaced facilities. Noticeably, that provision--§123--was one of the few provisions on

reimbursements for displacements by federal projects not repealed by the URA. Section 123 is explicit: Where allowed by state law, utility companies are to recoup their cost of relocating any utility facilities displaced by highway projects utilizing 90% federal funding. As the Delaware Supreme Court has written, to read the URA as including utilities "would render nugatory § 123 of the Federal Aid to Highways Act . . . ." Artesian Water Co. v. State Dept. of Highways & Transportation, 330 A.2d 432 (Supr. Ct.), aff'd as modified, 330 A.2d 441 (Del. 1974).

The District Court in the instant case provided further background against which congressional intent in passing the URA can be judged. That court pointed out that during congressional considera-tion of the URA a legal controversy had

arisen in Virginia, just across the river from Congress, involving payments to utilities displaced by federal highways and their reimbursement under § 123 of the Highways Act. That dispute "raised a real furor of intense and vocal interest" of which Congress certainly was aware when it voted on the URA:

> This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the Relocation Act of 1970 was before the Congress.

Chesapeake & Potomac, No. 79-906-N, supra.

The inclusion of utilities in a later Act of Congress makes it even clearer that the URA was not intended to include benefits for relocation of utility facilities. One of the state agencies listed as covered by the URA was the District of Columbia Redevelopment Agency, which, like the other state

agencies, was required by the URA to make relocation payments to persons or businesses displaced by federally funded projects. Sometime after the URA was passed in 1970, utility companies in the District of Columbia began to complain of being heavily burdened by the cost of relocating facilities displaced by federal projects. After thorough debate, therefore, Congress passed an Act, two years after the URA, that specifically provided for payments to utility companies whose facilities had been relocated as part of a federally funded project in the District of Columbia. District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495, 86 Stat. 812 (October 14, 1972). Had the URA already provided for such payments to utility companies for displaced facilities, that Act would have been

totally superfluous. It makes no sense to argue that Congress unnecessarily conducted a long study of and finally passed an Act to remedy a problem that had already been solved by the URA two years earlier. The only logical explanation is that Congress knew relocations of utility facilities were not covered by the URA and therefore passed an Act to compensate utilities for such displacements in the District of Columbia, leaving such displacements uncompensated outside the nation's capital.

Congressional intention not to disturb the common law rule that utilities bear the cost of moving their facilities from public streets is consonant with the primary purpose for which the URA was passed. The legislature wanted to alleviate the "inequitable burden" and "catastrophic results" of redevelopment

programs on "a few citizens," especially poor, non-whites, and small businesses. House Report No. 91-1656, reported in 1970 U.S. Code Cong. & Adminis. News at 5850-5852. Although reimbursement to businesses forced to absorb large moving expenses could fall within that overall aim, reimbursements to utility companies of millions of dollars for relocating their facilities does not fit logically within that scheme. Those persons and businesses to be reimbursed for moving personal property from redeveloped areas under the URA could not have anticipated such expenses. Utilities, on the other hand, traditionally expect to absorb the expense of moving their facilities and plan for such costs. Their rates are structured to allow them to recapture, as one of the costs of doing business, the expenses of removing

facilities from public streets.

The interpretation of the URA urged on this Court by NRHA and the City of Norfolk is the interpretation apparently given to the Act by HUD. Upon passage of the URA, Congress directed all federal agencies to issue any new guidelines necessary to implement the Act. Had HUD seen the URA as revising the law as to reimbursement to utilities for relocating their facilities, it would have revised its relevant guideline, Urban Renewal Handbook RHA § 7209.1, which was promulgated prior to the passage of the URA. Although other relevant HUD guidelines were rewritten, § 7209.1 was never revised by HUD.

II. THE DECISION OF THE FOURTH CIRCUIT IS CONTRARY TO THOSE OF EVERY OTHER STATE AND FEDERAL COURT THAT HAS CONSIDERED THE ISSUE.

Every court that has considered this subject, including the Sixth Circuit, has taken a position contrary to that of the Fourth Circuit. All state courts that have interpreted the URA or state statutes modeled on it have agreed that utilities were not meant to be reimbursed for moving their facilities from public streets. Pacific Telephone, supra; Artesian Water, supra; Mountain States Telephone & Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980). In addition, all other federal courts that have confronted the issue have reached a different result from that of the Fourth Circuit: Consumers Power Co. v. Costle, 615 F.2d 1147, 1149 (6th Cir. 1980), aff'g, 468

F. Supp. 375 (E.D. Mich. 1979); Lone Star Gas Co. et al. v. Landrieu, No. 80-100-C (U.S.D.C., E.D. Okla., March 30, 1981); Public Service Co. v. Harris, No. 79-C-37-3T (U.S.D.C., N.D. Okla., August 22, 1980).

C & P has sought to distinguish these cases on small differences in facts, but the thrust of all the cases is clear: Neither Congress nor any state legislature in passing state versions of the URA intended to completely overturn the long-standing common law rule that utilities absorb the costs of moving their equipment from public streets. In addition, two of the cases deal with facts almost identical to those in the instant case. In Mountain States, supra, the Idaho court denied that Congress included removal of utility facilities in the URA, writing:

> Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities and their relocation requirements, it is the opinion of this Court that the U.R.A. was not intended to include within its coverage the reimbursement sought by the plaintiffs in this action.

In Pacific Telephone, supra, the California Court of Appeals wrote of the state version of URA:

> Appellant contends that these definitions are all inclusive and that appellant fits within them . . . [and] that since no provision of the Relocation Assistance Law specifically excludes reimbursement of utility costs, the broad general definitions indicate a legislative intent that the common law does not apply.
>
> We disagree. An attempt to exempt utilities from the common law cannot be inferred merely from the broad general definitions used in the Relocation Assistance Law.

Pacific Telephone, supra, at 70-71

(emphasis supplied)(citations omitted).

III. THE EFFECT OF THE DECISION IS TO HAVE THE URA UNCONSTITUTIONALLY IMPAIR CONTRACTS BETWEEN CITIES AND UTILITY COMPANIES.

The effect of the Fourth Circuit's interpretation of the URA is to have the statute act in impairment of the contractual agreement between the City of Norfolk and the predecessor corporation to C & P, in violation of the Contract Clause of the Constitution. The decision similarly would impair perhaps hundreds of such franchises between cities and utility companies that serve their residents. If another reasonable interpretation of the statute would allow it to be upheld, this Court should not give the URA a reading that would render it unconstitutional. The city submits that Congress never intended to impair existing

contracts unconstitutionally by mandating that cities reimburse utilities for removing their equipment and lines from public rights-of-way.

The franchise agreement between C & P's predecessor and Norfolk dates back to 1898. See joint appendix of Petitioner and Respondent. Virginia statute expressly allows cities to place such terms and restrictions as they wish on the right of telephone companies to place their facilities in public rights-of-way. Va. Code Ann. § 56-460. Norfolk's franchise with C & P also is consistent with the common law of the vast majority of states and other similar agreements throughout the country in its terms: The utility company may lay its lines in the public streets without paying any fees but in return it must remove those facilities from the streets at the city's

request at its own expense.[3] C & P's rights clearly are conditioned on its obligations. C & P has stipulated that its agreement requires it to move its facilities at its own expense where traffic considerations cause a street closure, but it protests that this is not the case where condemnation for urban renewal causes the closure. Nothing in the franchise agreement, however, limits the reasons for which the city may request C & P to remove its facilities. Removing urban blight and closing streets are both public purposes that fall within the city police powers. Va. Code Ann.

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[3] As recently as 1971, the Virginia Supreme Court reaffirmed that a franchise such as the one between the City of Norfolk and C & P, that allows a utility company to place its facilities in public streets, is revocable at will and confers no property rights on the utility company. Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971).

§ 36-55.25. See also Mountain States, supra.

In the recent case of Energy Reserve Group, Inc. v. Kansas Power & Light Co., 51 U.S.L.W. 4106 (January 24, 1983), this Court held that a Kansas act that prevented intrastate gas prices from escalating to the federal price ceiling did not impair unconstitutionally a contract between a gas supplier and a utility company. This Court found no substantial impairment in part because the parties knew their rights in a heavily regulated industry were subject to alteration by state price regulation. Here, in contrast, the city and C & P's predecessor had no knowledge of and no reason to anticipate that the federal government would step in and regulate a traditionally locally-controlled situation involving placement and removal

of utility lines in city streets. The impairment of the contract between C & P and Norfolk is not just substantial; it changes the entire relationship between the parties to the contract. C & P can still place its facilities in city streets without paying any fees, but it now gets paid for removing those facilities. The quid pro quo has been eliminated from the contract.

The fact that no utility before C & P had filed for such reimbursement under the URA demonstrates the widespread acceptance of NRHA's position prior to the Fourth Circuit decision in this case. Utility companies apparently assumed that the URA had not changed the common law until the Fourth Circuit's holding altered the situation drastically. According to the responses of member cities to a recent NIMLO questionnaire,

dozens of cities have received or expect to receive similar reimbursement claims following the appellate decision in the instant case.

IV. CONGRESS DID NOT INTEND THE URA TO IMPOSE A DEVASTATING FINANCIAL BURDEN ON ECONOMICALLY DISTRESSED CITIES OR TO GIVE A WINDFALL TO UTILITIES THAT ALREADY HAVE RECOUPED RELOCATION COSTS THROUGH THEIR RATE STRUCTURES.

The Fourth Circuit's decision could have a disastrous economic impact on cities all over the country. The consequences for cities of having to pay for unbudgeted and unplanned for claims worth millions are potentially devastating. Cities already must cope with economic problems thrust back on them by the federal government under the New Federalism policies. These problems are intensified by cuts in federal funds, the loss of businesses and the middle class, diminishing tax bases, a deteriorating

infrastructure, increasingly costly social programs, and growing numbers of social-welfare beneficiaries.

Retroactive claims from utility companies for relocating facilities dating back to 1970 that could reach billions of dollars threaten to worsen that economic plight and take money from other pressing problems. The potential liability for the City of Norfolk in this case alone could reach one million dollars with interest calculated from the mid-1970's. In addition, future claims could substantially lessen the worth of federal funds for community development projects to come, thereby hampering the ability of older cities to maintain themselves solvent financially.

The number of future utility relocation claims probably will increase with the greater competition among local telephone companies, long distance companies,

and other electronic information companies resulting from the recent divestiture of American Telephone and Telegraph Company. Because of antitrust implications for cities of recent decisions, cities will have difficulty denying these companies the right to place equipment in public rights-of-way. The future cost of paying a number of utility companies each time a city street is closed in connection with urban renewal could be staggering.

Older cities in particular need all the funds allocated by Congress for redevelopment to retain industries and businesses against the attractions of the suburbs and Sunbelt cities. The decision that millions should be shifted from available urban renewal funds allocated by Congress to pay utility relocation costs has far-reaching economic consequences for cities. Such a decision should be made by the legislature, not

by the courts.

Congress in 1970 was aware of the worsening plight of cities. A congressional intention to put such an economic burden on cities in need of community development funds is not consonant with the principal purpose of Congress in enacting URA of benefiting the urban poor and small businesses, that is, those upon whom the heaviest burden of urban redevelopment falls and "who are the least able to absorb these federal programs." 115 Cong. Rec. 31, 533, 31, 534 (1969) (Statement of Sen. Edmond Muskie). Utility companies such as C & P are able to absorb such losses because they anticipate displacement of facilities from city streets and include those anticipated losses in the rate proposals they present to the state rate-setting authority. Virginia's State Corporation

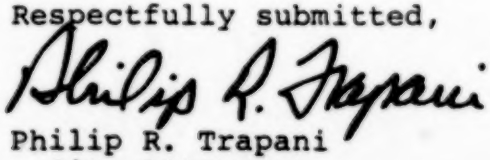
Commission factors many things into the rates it allows C & P to charge. The costs of removing facilities from public streets are spread out over several years, allowing C & P to fully recoup the expenses of relocation.

In contrast, the City of Norfolk neither anticipated nor appropriated funds to pay those costs. Covering a million dollars in unexpected and unanticipated costs is beyond the ordinary means of most cities for raising revenues through the tax structure. Because cities had no reason to expect claims for displacement of utility lines and equipment until the instant claim by C & P was upheld by the Fourth Circuit on March 25, 1982, it is doubtful that any cities have planned and budgeted for claims dating back to 1970.

CONCLUSION

The United States Supreme Court should reverse the decision of the Fourth Circuit in this case because it ignores a classic rule of statutory construction in treating an important federal statute as acting in complete derogation of state common law without a clear congressional intent to do so, is contrary to decisions of all other state and federal courts that have dealt with the issue, interprets the URA as acting to unconstitutionally impair the contract between C & P and Norfolk, and will place an unexpected and unplanned-for economic burden on the City of Norfolk and other economically hard-pressed cities.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 1983, three copies of the foregoing Brief Of The Amicus Curiae, The City Of Norfolk, Virginia, On Writ Of Certiorari In Support Of The Petitioner, were mailed, postage pre-paid, to each of the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment in

four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of

each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project...will result in the displacement of any person...the head of such agency shall make a payment to any displaced person...for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property....
>
> "§4601. Definitions. As used in this chapter -
>
> (5) The term 'person' means any individual, partnership, corporation or association.

> (6) The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project ....
>
> (7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -
>
> (a) for the sale of services to the public....
>
> "§4637. A person who moves or discontinues his business, or moves other personal property...as a direct result of any project or program...shall...be deemed to have been displaced as a result of the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not

included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d 1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights

in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla, August 22, 1980);

Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574, F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, the Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility representatives. In the end, as Alexander pro-

claims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons which were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail

furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official capacity as Secretary of Housing and Urban Development,

and

Norfolk Redevelopment and Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued December 7, 1981

Decided March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant; Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipaul, John R. Abbot, Peter M. Campanella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In

order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these projects, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" as "any person who... moves... as a result of the acquisition of... real property... for a program or project undertaken by a Federal agency, or with Federal financial assistance...." 42 U.S.C. §4601(6). "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601 (5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily - - (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public...." 42 U.S.C. §4601(7). Under 42 U.S.C. §4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving

personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at

common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" in S.1, 91st Cong., 1st Sess. §201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of... real property, in whole or in part..., for a program or project undertaken by a Federal agency, or with Federal financial assistance...." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of "business" and thus

a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan,

which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand.

III.

Under 42 U.S.C. §4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations require that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757,

1. 24 C.F.R. §42.40(m)(2).

761-62(1970).

In Transcontinental, gas pipe lines had been installed in land in which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Unde those circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not

annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of

installation that the facilities remain its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in connection with the removal of non-removable real estate. It is limited to the expense

of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

IV.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED